No. 75-913

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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WALTER M. HENRITZE, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that (1) the venue of his prosecution was improper, (2) his motion to suppress should have been granted, and (3) there was insufficient evidence to sustain his convictions.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of importation of hashish, in violation of 21 U.S.C. 952(a), and conspiring to import, distribute, and possess hashish, in violation of 18 U.S.C. 371.[1] He was sentenced to concurrent terms of two years' imprisonment and two years' special parole. The court of appeals affirmed (Pet. App. A) and denied a petition for rehearing *en banc* (Pet. App. B).

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[1]The court granted petitioner's motion for a directed verdict of acquittal on the charge of possession of hashish with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Tr. 199).

1. The evidence at trial established that on August 5, 1974, petitioner, an attorney in Atlanta, Georgia, told Ann Hester and Joyce Weldy, legal secretaries with whom he was acquainted, that he was expecting a shipment of a large quantity of "hash" from Amsterdam within the next week (Tr. 71-73, 83, 86-87). Two or three days later, petitioner also told another secretary, Teresa Moore, that he would be receiving a pound of "hash" from Amsterdam and asked that she let him know if any of her friends needed any of it (Tr. 95-96).

At about the same time, on August 8, 1974, Frank Cuccaro, a mail specialist with the United States Customs Service in New York City, opened a package from the Netherlands addressed to June Llewellyn in Atlanta, Georgia, pursuant to instructions to open all parcels (with limited exceptions) coming from certain countries. In the package, he discovered two slabs of hashish, weighing about a pound, sandwiched between layers of candy in a box of chocolates. After testing and recording the contents, Cuccaro rewrapped the package and mailed it to a postal inspector in Atlanta (Tr. 59-66, 69, 104).

On September 12, 1974, the package was reopened by federal authorities in Atlanta, and material from the slab again tested positively for hashish (Tr. 149). The same day a warrant was obtained from a federal magistrate, authorizing a search for the box of chocolates containing the hashish at the location to which the box was addressed, 2311 Bank of Georgia Building, Atlanta, Georgia. The search warrant stated that it must be executed between the hours of 8:00 a.m. and 12 noon on September 13, 1974, at that address (Pet. App. D).[2]

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[2]The affidavit stated that the "box is scheduled for controlled delivery to 2311 Bank of Georgia Bldg., Atlanta, Ga., on 9/13/74, at 9:45 a.m." Petitioner's appendix (Pet. App. D 8a) does not reflect the words "controlled" and "at 9:45 a.m.," which were added by hand to the typed affidavit by Agent James Williams of the Drug Enforcement Administration and were initialled by him.



On September 13, 1974, within the fixed time limits, two undercover DEA agents entered the premises described in the warrant, which had previously been ascertained to be a law office where Llewellyn was employed. Under the pretext of wanting to see a lawyer, the agents waited in the reception area in order to observe the controlled delivery of the hashish (Tr. 127-128, 134-135, 154). The regular postal carrier soon delivered the package to Llewellyn, the receptionist, and left with a receipt (Tr. 117-118). Petitioner then came into the reception area from his office and took the package from Llewellyn (Tr. 121-122). He held it for a few minutes, put it on her desk, and returned to his office (Tr. 124). A short time later, after petitioner had left the office for court (Tr. 124), Llewellyn placed the package in petitioner's office (Tr. 125).[3] Agent Williams thereupon entered the inner office with the search warrant and seized the package (Tr. 127, 151).

2. Petitioner contends (Pet. 10) that venue was improper in the Northern District of Georgia because the crimes of conspiracy and importation were completed at the port of entry, New York City. Petitioner first rasied the claim of improper venue on appeal. Since this alleged defect was apparent on the face of the indictment, petitioner's failure to object either before or during trial waived any objection. *United States* v. *John*, 518 F. 2d 705, 708-709 (C.A. 7); *United States* v. *Jackson*, 482 F.2d 1167, 1179 (C.A. 10), certiorari denied, 414 U.S. 1159. See also *United States* v. *Dryden*, 423 F.2d 1175, 1178 (C.A. 5), certiorari denied, 398 U.S. 950.

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[3]Llewellyn testified that petitioner had told her in early 1974 that if a package came addressed to her, it would be meant for him and that she should receive it (Tr. 122-123). Subsequently, a package from overseas had arrived in her name and she had put it in petitioner's office (Tr. 123). Accordingly, Llewellyn believed the second package was meant for petitioner as well (Tr. 122).

In any event, the venue here was proper because the conspiracy to import hashish did not terminate when the package first entered the United States but continued until its delivery to petitioner in Georgia. See *United States* v. *Reynolds,* 511 F.2d 603, 607 (C.A. 5); *United States* v. *Guajardo,* 508 F.2d 1093, 1095 (C.A. 5), certiorari denied, October 6, 1975, No. 74-6489; *United States* v. *Lawson,* 507 F.2d 433, 445 (C.A. 7), certiorari denied, 420 U.S. 1004. Since the arrival of the package in Atlanta obviously was integral to petitioner's conspiracy to import it, venue lay in the Northern District of Georgia. *Hyde* v. *United States,* 225 U.S. 347, 367. Moreover, since the conspiracy included not only the importation but also the possession and distribution of the hashish, petitioner's solicitation of Teresa Moore in Atlanta also was an overt act that established venue.[4]

Even though it is unnecessary to reach the question in light of the concurrent sentences imposed on petitioner, see *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16, venue also was proper in the Northern District of Georgia for the substantive importation offense. Importation of a controlled substance is a continuing crime, which may be prosecuted at the place of ultimate delivery as well as at the port of entry. See 18 U.S.C. 3237(a); *United States* v. *Barnard,* 490 F.2d 907, 911 (C.A. 9), certiorari denied, 416 U.S. 959; *United States* v. *Jackson, supra,* 482 F. 2d at 1178.[5]

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[4]An overt act may be proven although it is not alleged in the indictment. *United States* v. *Downing,* 51 F.2d 1020, 1031 (C.C.A. 2).

[5]*Keck* v. *United States,* 172 U.S. 434, upon which petitioner relies, was decided prior to the enactment of Section 3237(a). Moreover, despite petitioner's citation of two district court cases, there is no conflict among the circuits as to whether importation of a controlled substance is a continuing offense. The Ninth Circuit in *United States* v. *Barnard, supra,* has disagreed with the dicta in *United States* v. *Feldman,* 366 F. Supp. 356 (D. Hawaii), and we are unaware of any decision in the Fourth Circuit that has adopted the reasoning in *United States* v. *Lember,* 319 F. Supp. 249 (E.D. Va.).



3. Nor is there merit to petitioner's several contentions (Pet. 12-15) that the hashish was illegally seized. First, the package from the Netherlands was properly opened in New York by customs officials acting without a warrant. As this Court recognized in *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 125:

> Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers "[t]o regulate Commerce with foreign Nations." Art. I, §8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.

Accordingly, the government is free to inspect international mail entering this country without probable cause or other suspicion. *United States* v. *King,* 517 F.2d 350, 351-352 (C.A. 5); *United States* v. *Barclift,* 514 F.2d 1073, 1075 (C.A. 9), certiorari denied, October 6, 1975, No. 74-6431; *United States* v. *Odland,* 502 F.2d 148, 150-151 (C.A. 7) certiorari denied, 419 U.S. 1088. Cf. *United States* v. *Doe,* 472 F.2d 982 (C.A. 2), certiorari denied *sub nom. Rodriquez* v. *United States,* 411 U.S. 969.

Furthermore, the presence of the undercover agents in petitioner's outer office during the controlled delivery was not a search, since the reception area was open to the public. *Katz* v. *United States,* 389 U.S. 347, 351; *Lewis* v. *United States,* 385 U.S. 206, 210-211. Nor were the agents required to give notice of their authority and purpose pursuant to 18 U.S.C. 3109, for they made a normal

entrance into an office open for business, not a forcible entry into a house. Their entry into the inner office to which Llewellyn had delivered the package was proper to execute the search warant.

Finally, the warrant adequately described the premises to be searched. Although the premises were designated by reference to the box, the warrant also directed the officers to execute the search at the specific location, 2311 Bank of Georgia Building, to which the package was addressed. Viewed "in a commonsense and realistic fashion," *United States* v. *Ventresca,* 380 U.S. 102, 108, the warrant described with sufficient particularity the object and situs of the search.

4. Petitioner contends (Pet. 16) that the evidence was insufficient to support his convictions for importation and conspiracy. Viewing the evidence in the light most favorable to the government (*Hamling* v. *United States,* 418 U.S. 87, 124), there was substantial evidence to sustain the jury's verdicts. From petitioner's statements to Hester, Weldy, and Moore that he would be receiving a pound of hashish from Amsterdam within a week, the jury could legitimately infer that petitioner had entered into an agreement with one or more other persons for the drugs to be sent to him in Atlanta. The arrival a few days thereafter of the box from the Netherlands addressed to petitioner's office in Atlanta, in addition to Llewellyn's testimony about petitioner's use of her name to receive packages, also amply supported the jury's finding of illegal importation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

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